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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1182

NOELLE M. HENRY,

Petitioner,

—v.—

COAHOMA COUNTY BOARD OF EDUCATION, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
DERRICK A. BELL, JR.
10 Columbus Circle
New York, New York 10019

R. JESS BROWN
125½ North Farish Street
Jackson, Mississippi

Attorneys for Petitioner

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COAHOMA COUNTY BOARD OF EDUCATION, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above-entitled cause on December 3, 1965, rehearing having been denied on January 4, 1966.

Citations to Opinions Below

The opinion of the District Court is set forth at R. 198, and reported at 246 F. Supp. 517.[1] The opinion of the Court of Appeals, printed in Appendix B, *infra*, p. 27, is reported at 353 F.2d 648.

[1] The District Court opinion is in the Record printed below, 9 copies of which have been filed under Rule 21(4).

Jurisdiction

The judgment of the Court of Appeals was entered December 3, 1965. Petition for rehearing was denied January 4, 1966. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

I.

Whether petitioner, an experienced and capable Negro public school teacher in Mississippi whose husband is a prominent civil rights leader, was deprived of rights protected by the due process and equal protection clauses of the Fourteenth Amendment when she was denied reemployment without a hearing, without any statement of the grounds for the denial, and on the asserted ground that her husband was a defendant in civil and criminal litigation initiated by state officials (and in which he subsequently prevailed in this Court), although there was no showing that petitioner was in any way responsible for her husband's alleged acts or that they impaired petitioner's fitness as a teacher?

II.

Whether petitioner was denied reemployment on the basis of her civil rights affiliations and those of her husband in violation of her rights under the due process and equal protection clauses of the Fourteenth Amendment, where she presented substantial evidence establishing this claim (including the use of an affidavit statute invalidated in *Shelton* v. *Tucker,* 364 U.S. 479), and the defendants' general denials included no showing of any reason for the denial of reemployment which has a rational bearing on her fitness as a teacher?

Constitutional and Statutory Provisions Involved

This case involves Section 1 of the Fourteenth Amendment of the Constitution of the United States. The statutory provisions involved are §§6282-41 to 6282-45, Miss. Code Annot. 1942. They are printed in Appendix A, *infra*, pp. 23-26.

Statement of the Case

Petitioner, Mrs. Noelle Henry, was one of the best teachers in the Coahoma County school system (R. 109), and the only teacher with acknowledged connections with a civil rights group (R. 114, 129). The School Board was aware of this through affidavits she submitted listing her NAACP membership (R. 74-75),[2] and because it was common knowledge that her husband, Dr. Aaron Henry, is State President of the National Association for the Advancement of Colored People (NAACP) (R. 72, 133).

Petitioner taught for eleven years in Coahoma County schools (R. 53).[3] Teaching classes with from 50 to 71 pupils, she was highly regarded by her principal and her supervisor (R. 91-92, 98) who, in April 1962, recommended that she be rehired for the 1962-63 school year (R. 60, 98) in her $3,450 position as third grade teacher in the all-Negro McCloud School (R. 54-55). But, although other teachers recommended by principals and supervisors have invariably been rehired (R. 71, 103), the Superintendent announced she would not be offered a new contract (R. 99-

[2] The Board's affidavit requirement complies with a state statute §§6282-41 to 6282-45 Miss. Code Annot. (1942), enacted in 1956, requiring as a condition precedent to employment the annual filing of an affidavit listing without limitation every organization to which the teaching applicant belonged or regularly contributed within the preceding five years.

[3] Prior to this she taught for 5 years in Jackson, Mississippi (R. 53).

100). The same year petitioner was discharged, three unrecommended teachers from her school were rehired and assigned to different schools (R. 88).

Seeking an explanation, petitioner made three separate inquiries to the Board and Superintendent (R. 61-62, 65-66, 67-69). Efforts to secure a hearing before the Board failed (R. 66, 69). Petitioner testified that the Superintendent denied knowing why she was not rehired, and told her:

> Your contract just wasn't renewed for 1962-63, and he said I don't know why the board didn't renew your contract; in going over the contracts when they got to your name they said we don't choose to renew this one. They didn't tell me why and I don't know why (R. 62).

But, the Superintendent testified the Board followed his recommendation (R. 141), denying that it was based on petitioner's NAACP membership and activities (R. 140, 162), although on three previous occasions school officials expressed concern about approving her contract because of her civil rights connections (R. 111-12, 112-13, 118). Rather, he asserted (for the first time during the trial)[4] that he acted on a newspaper report that petitioner's husband was convicted of a misdemeanor involving "morals" (R. 144), and later advice that petitioner's husband was sued for libel by the Prosecutor and Chief of Police who, Henry charged, "framed" him, retaliating for his civil rights activities (R. 147).[5] Finally, the Superintendent said he was told that petitioner and her husband "would be"

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[4] Neither the Answer to the Complaint nor the answers to interrogatories mentioned any of the grounds subsequently given for petitioner's discharge (R. 12-16, 30-33).

[5] The opinion below mistakenly states that Mrs. Henry was not reemployed because of an "adverse judgment" in the libel case (353 F.2d at 649). But, Mrs. Henry was notified that she would not be re-

sued by the plaintiffs in the libel suit to undo an alleged fraudulent conveyance of property (R. 142). He testified that the "activities" of petitioner and her husband were "highly controversial" and that all this litigation would be "a bad influence on children and other teachers" (R. 141-42).

The Superintendent conceded he made no investigation concerning the conviction. He did not know there was no jury trial in the Justice of the Peace Court, or that there was one in the County Court (R. 144-47). He acted before the Mississippi Supreme Court reversed the guilty verdict on June 3, 1963, and although that Court later withdrew this decision and affirmed on July 12, 1963, the Superintendent took no action during the interim to reinstate petitioner (R. 149).[6] Asked whether he made any investigation into the basis for the libel charge, the Superintendent asserted: "It is not my position to dig into lawsuits. My position doesn't entitle me to that time" (R. 164).[7]

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employed on June 4, 1962 (R. 60). The libel trials were held in July 1962 (*Henry* v. *Pearson*, 158 So.2d 695, 698).

[6] The first opinion of the Supreme Court of Mississippi reversing the guilty verdict was originally reported as *Henry* v. *State of Mississippi*, 154 So.2d 289 (1963). Following a Suggestion of Error submitted by the Attorney General of Mississippi, the first opinion and judgment were withdrawn, and a second opinion affirming the judgment of the trial court is now reported at 154 So.2d 289. On certiorari to this Court the conviction was vacated because based on illegally obtained evidence and remanded for a determination as to whether counsel had intentionally waived the right to object to such evidence. *Henry* v. *Mississippi*, 379 U.S. 443 (1965). To date, no action to obtain such a determination has been taken by the state courts.

[7] The libel suits filed against petitioner's husband by the Clarksdale Chief of Police, Benford Collins, and the Coahoma County Attorney Thomas H. Pearson resulted in judgments against petitioner for $40,000. These were affirmed by the Mississippi Supreme Court. *Henry* v. *Collins*, 158 So.2d 28 (1963); *Henry* v. *Pearson*, 158 So.2d 695 (1963), but were reversed by this Court. *Henry* v. *Collins*, 380 U.S. 356 (1965).

Petitioner filed this suit against the Board and Superintendent in October 1962 in the United States District Court for the Northern District of Mississippi. Federal jurisdiction and the claim for injunctive relief were founded on 28 U.S.C. §1343(3) and 42 U.S.C. §1983. Having failed to obtain any information on the basis for her dismissal from the Board or its Superintendent, she alleged the discharge was caused by her NAACP membership and her husband's civil rights activity (R. 2, 7). The trial court sustained all objections (R. 164-65, 167-72) to questions aimed at ascertaining whether growing civil rights activity in the State influenced the decision to replace petitioner (R. 151-52). Nevertheless, in dismissing the complaint it ruled that petitioner failed to sustain her burden of proving that she was discharged for NAACP membership, associations and activities (R. 204).

Following the Superintendent's assertion at trial that he refused to rehire petitioner because her husband was in litigation, petitioner's counsel, pursuant to Rule 15(b) Federal Rules of Civil Procedure, moved to amend the complaint to conform to this evidence, asserting in the proposed amendment that these reasons were as unconstitutional as those alleged originally (R. 193-97). Denying petitioner's motion to amend, the trial court nevertheless wrote that the Superintendent was not arbitrary but "had good cause and exercised a sound discretion" (R. 202-04), in dismissing petitioner if, in his opinion, her husband became notorious in the community. The court agreed that petitioner was "tarred with the same brush" by reason of her marriage and might eventually become personally and unfavorably involved (R. 203). Because she was not rehired, the trial court deemed petitioner a "non-teacher" lacking standing to question the validity of statutes requiring the filing of membership affidavits (R. 207).

The Fifth Circuit affirmed *per curiam* and adcpted the trial court's opinion. Judge Brown, concurring, emphasized that the broad discretion of school officials in hiring teachers cannot be used to interfere with, or discourage the exercise of, federally secured civil rights. A teacher's husband's criminal record and involvement in litigation, according to Judge Brown, "in many cases may justify a refusal to recommend her for this sensitive employment . . ." (App. p. 31). However, if such record and involvement spring solely from attempts to exercise civil rights, such circumstances would not justify a refusal to recommend. In Judge Brown's view, petitioner failed to prove that the Superintendent's refusal to recommend her was based on her civil rights activities or her husband's, or that his involvement in criminal and civil litigation arose from constitutionally protected assertions of civil rights.

On rehearing, petitioner pointed out that the trial court would not permit her to show that the Superintendent knew that community sentiment opposed school desegregation or that civil rights leaders like petitioner's husband frequently are charged with violating criminal laws, but that such prosecutions, while designed to deter civil rights activity seldom, if ever, expressly charge violation of segregation laws; rather, they run the gamut of other criminal statutes.

The Fifth Circuit denied petitioner's petition for rehearing on January 4, 1966.

Reasons for Granting the Writ

Introduction

This case presents questions of substantial public importance, involving a claim of arbitrary and discriminatory denial of public employment contrary to principles declared by this Court. It involves a Negro school teacher denied reemployment in the context of the struggle for public school desegregation in Mississippi. The problems of Negro teachers displaced by discrimination during the desegregation process[8] or discharged in reprisal for their opposition to segregation[9] are matters of national concern. This Court has seen fit to closely scrutinize cases touching on the rights of Negro teachers in relation to school desegregation. *Shelton* v. *Tucker,* 364 U.S. 479; *Bryan* v. *Austin,* 354 U.S. 933; *Bradley* v. *School Board,* 382 U.S. 103; *Rogers* v. *Paul,* 382 U.S. 198. As Mr. Justice Harlan wrote dissenting in *Shelton* (364 U.S. at 496-97), "protection [of constitutional rights] in the context of the racial situation in various parts of the country demands the unremitting vigilance of the courts."

The case involves issues similar to those decided by this Court in a variety of other cases involving First Amendment claims of teachers and, we submit, a conflict with the

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[8] The National Education Association has sponsored a detailed study of the problem. See "Report of Task Force Appointed to Study the Problem of Displaced School Personnel Related to School Desegregation and the Employment Studies of Recently Prepared Negro College Graduates Certified to Teach in 17 States", December, 1965. See also, Ozmon, "The Plight of the Negro Teacher", The American School Board Journal, pp. 13-14, September, 1965.

[9] See *Bryan* v. *Austin,* 354 U.S. 933, vacating 148 F. Supp. 563 (E.D. S.C. 1957); *Shelton* v. *Tucker,* 364 U.S. 479; *Ludley* v. *Board of Supervisors of L.S.U.,* 150 F. Supp. 900 (E.D. La. 1957), *aff'd* 252 F.2d 372 (5th Cir. 1958), *cert. den.,* 358 U.S. 819.

principles decided in those cases. *Wieman* v. *Updegraff*, 344 U.S. 183; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278; *Baggett* v. *Bullitt*, 377 U.S. 360; *Slochower* v. *Board of Higher Education of the City of New York*, 350 U.S. 551.

Recently the Court granted certiorari in a case involving the right of a school board to dismiss a teacher in retaliation for the exercise of asserted First Amendment rights, but vacated the judgment when the cause was affected by supervening legislation. See *Watts* v. *Seward School Board*, 381 U.S. 126, where school teachers were dismissed for "immorality" consisting of their having urged the ouster of the Superintendent and the Board. This Court vacated and remanded for reconsideration in light of new legislation barring school boards from interpreting "immorality" to restrict the right to criticize school officials.

I.

The Denial of Reemployment to Petitioner Was Arbitrary and in Violation of Her Rights under the Fourteenth Amendment.

Petitioner has contended that the school authorities merely used her husband's difficulties to screen the real reason for her dismissal, which was to combat NAACP sponsored school desegregation efforts. But assuming *arguendo* that the Superintendent's stated reasons were the basis for petitioner's dismissal, we submit that the stated grounds were arbitrary and unreasonable in violation of her Fourteenth Amendment rights.

This Court clearly has held that a state may not exclude a person from public employment for reasons which are "patently arbitrary or discriminatory." *Wieman* v. *Upde-*

graff, 344 U.S. 183, 192; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 288; *Torcaso* v. *Watkins*, 367 U.S. 488, 495-96; *Baggett* v. *Bullitt*, 377 U.S. 360; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Slochower* v. *Board of Higher Education of the City of New York*, 350 U.S. 551.

We submit that the actions of the Coahoma County school officials in denying Mrs. Henry reemployment were indeed patently arbitrary and unfair. Before detailing this, it ought to be noted that while in a formal sense the action of the authorities was to refuse to rehire petitioner, this action, placed in its context, is tantamount to dismissing her from her job. She had held her job eleven years, and her principal and supervisor recommended that her employment be continued. Such recommendations were invariably followed and thus reemployment was more or less automatic or routine until petitioner's case. See Judge Parker's dissent in *Bryan* v. *Austin*, 148 F. Supp. 563, 572-73 (E.D. S.C. 1957), *vacated*, 354 U.S. 933. But the school officials' action violated the Fourteenth Amendment whether it is viewed as a job dismissal or as a rejection of an application for public employment. In neither context can the State impose unconstitutional conditions upon the opportunity to hold public employment. Cf. *Alston* v. *School Board of the City of Norfolk*, 112 F.2d 992, 997 (4th Cir. 1940), *cert. den.* 311 U.S. 693; *Frost Trucking Co.* v. *Railroad Comm.*, 271 U.S. 583, 594; *Speiser* v. *Randall*, 357 U.S. 513; *Sherbert* v. *Verner*, 374 U.S. 398.

Mrs. Henry was denied reemployment without any notice of the charges against her. Her repeated attempts to learn the ground for the action were unavailing. Consequently, she had no opportunity to explain or refute the charges against her, and no opportunity to attempt to show that the accusations were untrue or had no bearing on her fitness. Her requests for a hearing were denied. The

Superintendent informed himself of the facts solely by newspaper accounts (R. 144), and conversations with the lawyer representing Mr. Henry's adversaries in a libel suit (R. 144, 147).

The denial of notice of the charges and a hearing when petitioner was denied reemployment violate fundamental conceptions of fairness. This is not a case where a teacher was denied reemployment because of dissatisfaction with her job performance. The entitlement to a hearing in such a case might involve different issues. But the action to deny Mrs. Henry's job was taken because the Superintendent thought petitioner and her husband were engaged in "highly controversial" activities (R. 141). Such a charge is so plainly susceptible of use to hide forbidden purposes that the minimal protection of notice and a hearing is compellingly necessary.

As this Court pointed out in *Greene* v. *McElroy*, 360 U.S. 474, 496-99, the right to notice and a hearing is fundamental in certain administrative and regulatory actions as well as in criminal cases. In *Greene* the Court said (360 U.S. at 496):

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and the only reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

In another context, in *Slochower* v. *Board of Higher Education of the City of New York*, 350 U.S. 551, the Court condemned the summary dismissal of a teacher without hearing under a statute providing for the discharge with-

out notice or hearing of any city employee utilizing the privilege against self-incrimination. See *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961), *cert. den.* 368 U.S. 930, and *Knight* v. *State Board of Education,* 200 F. Supp. 174 (M.D. Tenn. 1961), both holding that students in state schools had a due process right to hearings before expulsion.

When the Superintendent finally (midway through the trial of this case) stated why he did not rehire petitioner, he gave reasons which, we submit, demonstrate that the action was arbitrary and unfair. The reasons were that petitioner's husband had been convicted of a morals charge and had been sued for libel by the Chief of Police and County Attorney, and that the Superintendent was told that a suit "would be instigated for setting aside property to Noelle Henry by her husband to avoid payment on the libel charge" (R. 142). Thus petitioner was denied reemployment because of a criminal charge and a civil suit against her husband and because a lawyer threatened to file a further civil suit involving her property. There was no claim or showing that Mrs. Henry was in any way culpable or did any blameworthy act in connection with any of those cases. There was no claim that she knew of or could have prevented any of the alleged acts by her husband. It is quite plain that the denial of reemployment punished petitioner for the alleged acts of someone else which she had no power to control or prevent.

We submit that it is fundamentally unfair and a denial of due process to punish petitioner for the alleged acts of another. There is no claim that her husband's troubles actually impaired petitioner's performance of her job as a third grade teacher. Her supervisors recommended that she be reemployed and had nothing but praise for her work. We submit that it is not permissible to make an

automatic inference or presumption that petitioner was unfit to teach because her husband was a party to civil litigation and was convicted of a crime. This presumption is no more permissible than was New York's presumption that a teacher who relied on the privilege against self-incrimination was unfit to teach. *Slochower* v. *Board of Higher Education of the City of New York*, 350 U.S. 551.

The presumption that petitioner was unfit because her husband was convicted, and had been sued for damages, and because it was said that she was going to be sued in the future, is not founded on reason. This punishment of one for the deeds of another partakes of some of the characteristics of Bills of Attainder which carried with them a "'corruption of the blood,' which meant that the attainted party's heirs could not inherit his property" and sometimes "exclusion of the designated party's sons from Parliament." See *United States* v. *Brown*, 381 U.S. 437, 441-42.

The presumption here imputes guilt to the wife from association with her husband. In *Wieman* v. *Updegraff*, 344 U.S. 183, the Court condemned a law which might punish innocent as well as guilty activity. The Coahoma County school officials have simply punished petitioner for innocent activity.

Petitioner would have no assurance that she could rehabilitate herself in the eyes of the school officials even by so drastic a step as separating from her husband and seeking a divorce. But we need not stop long to ponder that because making public employment conditional upon obtaining a divorce is a flagrant invasion of the right of free association in marriage. See *Griswold* v. *Connecticut*, 381 U.S. 479; *cf. Meyer* v. *Nebraska*, 262 U.S. 390, 399; *Skinner* v. *Oklahoma*, 316 U.S. 535, 541.

We urge that the principle that public employees can be deprived of their jobs because of the misdemeanors of their spouses is totally alien to conceptions of fairness embodied in our law. The principle that public employees can be fired because private litigants sue their relatives for damages is even worse. The principle that public employees can be fired because someone merely threatens to sue them is preposterous. However sensitive a teacher's job—and sensitive it is—there is no justification for conditioning their employment on events which they can never control and which have no necessary relation to their fitness.

The injustice of punishing Mrs. Henry because of the alleged misdeeds of her husband is compounded by the ironical result that while Mrs. Henry has now been punished for four years, Dr. Henry was saved from criminal punishment or from paying damages by the due process clause of the Fourteenth Amendment. His criminal conviction was vacated by this Court in *Henry* v. *Mississippi*, 379 U.S. 443, and no further action has been taken since the case was remanded to the trial court. The libel judgments against him were also reversed by this Court in *Henry* v. *Collins*, 380 U.S. 356, and that result mooted the dispute over an alleged fraudulent conveyance.

The view that Mrs. Henry was "tarred with the same brush" by reason of her marriage (R. 203) was thought by the courts below to be sufficient to dispose of the matter. The opinion below did not see fit to mention that all of the judgments against Dr. Henry had been set aside by this Court. Thus petitioner was tarred by the brush of the accusations but denied the benefit of her husband's vindication.

The trial court recognized that this case involves the doctrine of guilt by association and its opinion quotes and

relies upon language in *Adler* v. *Board of Education,* 342 U.S. 485, which is asserted to sanction that doctrine (R. 203-204). Whatever may be the permissible reach of that doctrine where knowing and sympathetic association with subversive groups is involved, surely the permissible scope of its application must be narrowly circumscribed where the association is one of marriage or kinship and has no connection with the alleged antisocial conduct.[10]

II.

Petitioner Was Discharged in Violation of Her Fourteenth Amendment Rights Because of Her Own Civil Rights Involvement and Her Husband's.

The lower courts found petitioner failed to prove "by a preponderance of the evidence" that the School Board refused to rehire her because of her civil rights affiliations and those of her husband. But these findings are contrary to the record. The issue involves the proper inferences to be drawn from known facts which are determinative of constitutional rights. This Court has traditionally exercised its power to scrutinize the record and make its own independent examination of the facts determinative of constitutional claims. *Napue* v. *Illinois,* 360 U.S. 264, 271-72, and cases collected in Note 4; *Watts* v. *Indiana,* 338 U.S. 49, 50-51; *Norris* v. *Alabama,* 294 U.S. 587, 589-90; *Niemotko* v. *Maryland,* 340 U.S. 268, 271; *Pierre* v. *Louisiana,* 306 U.S. 354, 358.

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[10] See Brown, *Loyalty and Security,* Yale Univ. Press (1958), which summarizes public resentment to "guilt by relationship" and "guilt by marriage and kinship" cases when they came to public attention in 1955. Such cases are reported in *Government Security and Loyalty,* 31:501-502, GSL Newsletter, Bureau of National Affairs (BNA), Oct. 1955.

Petitioner was an effective teacher (R. 91-92, 98) who, despite long experience and continuing favorable supervisors' recommendations (R. 92, 103), had nearly been refused a teaching contract during 1955, 1956 and 1961, because of her NAACP affiliation (R. 73, 111-12; 112-13; 118, 133). Petitioner was the only one of 200 teachers (R. 129) in the system (all assigned to schools on a segregated baisis, R. 130) who professed NAACP membership (R. 113-14), and the only one whose spouse was active in civil rights efforts (R. 133). The Board replaced petitioner with a teacher without teaching experience (R. 151-52).

The Board obtained its first official knowledge of petitioner's NAACP membership (R. 113) through a teacher affidavit statute enacted by the Mississippi Legislature in 1956, §§6282-41 to 6282-45, Miss. Code Annot. 1942 virtually identical to Arkansas's provision invalidated in *Shelton* v. *Tucker*, 364 U.S. 479 (1960). The law requires all teaching personnel to submit annually as a condition precedent to employment, an affidavit listing every organization to which the applicant belonged or regularly contributed within the preceding five years. Such a provision, as this Court held in *Shelton* v. *Tucker, supra,* must be considered against the system of employment in which teachers are hired on a year to year basis, without job security beyond the end of each school year (R. 201, 205). The dangers of the Mississippi law are greater than those of Arkansas because Mississippi has continued to enforce its statute after *Shelton* v. *Tucker, supra.*[11]

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[11] Even the dissenters in *Shelton* indicated their opposition was limited to the statute's validity on its face and that proof of abuses in the Act's administration would make a different case, 364 U.S. 499. In Mississippi, state statutes and the Board's continuing policy of segregation raise a strong presumption of such abuses.

Because of her NAACP listing, the former Superintendent wanted to refuse petitioner's application for a contract or to subject it to termination on two weeks notice (R. 112-13) but was persuaded to change his mind. The present Superintendent, upon reviewing the membership affidavits in 1960 was shocked by petitioner's NAACP entry and had to be persuaded to offer her a contract for the 1960-61 school year (R. 118).[12]

When in 1962 the Superintendent overruled recommendations by her principal and supervisor that petitioner be rehired, it upset a long-established practice of honoring such recommendations (R. 103), but accommodated a phalanx of Mississippi statutes requiring public school segregation[13] and that public officials resist by all legal means, the implementation of this Court's desegregation decisions.[14] The Coahoma County schools were operated on a completely segregated basis when petitioner was dis-

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[12] Petitioner's effort to challenge the Mississippi affidavit statute were frustrated by the lower court's ruling that at the time suit was filed she had not been rehired and was a "non-teacher" (R. 207). This ruling failed to consider that all persons to whom the membership affidavit requirement could possibly apply are "non-teachers" since they are mere applicants for teaching contracts at the point where the affidavit must be completed. The Mississippi statute provides, as did the Arkansas provision, that: "No . . . teacher shall be employed . . ., until, as a condition precedent to such employment, such . . ., teacher shall have filed . . . an affidavit. . . ." Compare §6282-41 Miss. Code Annot. 1942 (p. 23, *infra*), with Act 10 of the 2nd Ex. Sess. of Arkansas General Ass. of 1958, *Shelton* v. *Tucker*, 364 U.S. 479, 480, n. 1 (1960). Moreover, petitioner is clearly in the class affected by this legislation and may challenge the imposition of this unconstitutional burden upon her without refusing to sign an affidavit in order to make a test case. *Evers* v. *Dwyer*, 358 U.S. 202 (1958). See also, *Alston* v. *School Board of City of Norfolk*, 112 F.2d 992, 996-97 (4th Cir. 1940); *Bryan* v. *Austin*, 148 F. Supp. 563, 572 (E.D. S.C. 1957) (dissent by Judge Parker), *vacated*, 354 U.S. 933.

[13] Section 4065.3 Miss. Code of 1942 Annot., see also Article 8, §207, Miss. Const.; §§2056, 3841.3, 6220.5, 6328-03 and 9028-31-48 Miss. Code of 1942 Annot.

[14] §4065.3 Miss. Code of 1942 Annot, requires the entire executive branch of the Government, including "all boards of county superintendents of education . . . to prohibit, by any lawful, peaceful and consti-

missed (R. 130), and the system remained totally segregated until January 1966, when two Negro pupils were admitted to a white school under a plan submitted to the U. S. Office of Education under the Civil Rights Act of 1964.

Petitioner submits that these facts establish a *prima facie* case of discrimination because of her NAACP activities and associations, and the burden shifted to the school authorities to produce evidence sufficient to combat the clear inference. Nor could such inferences be overcome by the Superintendent's mere assertions that petitioner's civil rights connections played no part in her dismissal (R. 140) where no reasonable alternative ground for dismissal having a rational relation to her fitness was put forth. Cf. *Eubanks* v. *Louisiana,* 356 U.S. 584 (1958); *Reece* v. *Georgia,* 350 U.S. 85 (1955); *Avery* v. *Georgia,* 345 U.S. 559 (1953); *Norris* v. *Alabama,* 294 U.S. 587 (1935).

The Superintendent claimed that after learning from a newspaper article about petitioner's husband's difficulties in March, 1962 (R. 144), he refused to follow the favorable recommendations of her principal and supervisor. Yet, in May 1962, he gave no reason to the Supervisor of Negro Schools why the Board had not renewed her contract (R. 99). Then, in June, 1962, he told petitioner that it was not he, but the Board who had refused her application, and he did not know why they had so acted (R. 62). Finally, in September, 1962, in answer to petitioner's re-

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tutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court, . . . [citations omitted] and to prohibit by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools. . . ."

quest for a hearing or at least some explanation, the Superintendent replied, orally and by letter, that no reasons had to be given and that the action of the Board was final (R. 68-69). The reasons for discharge were not mentioned in the defensive pleadings or answers to interrogatories. Nothing, except the Superintendent's bare assertion, contradicts the proposition that the stated reasons for denying reemployment were after-the-fact rationalizations for the action.

The Superintendent made no investigation of the status of the criminal charge or the libel suit against petitioner's husband (R. 144, 164). He made no investigation of the rumored fraudulent conveyance (R. 147). Even the Supreme Court of Mississippi's reversal of petitioner's husband's conviction, albeit temporary, had no effect in his decision (R. 148-49).

The Superintendent claimed his action was based on concern for the welfare of Negro children (R. 141-42) and reported that, after receiving complaints from the Negro supervisor and the Negro community, a Negro principal was dismissed because of his wife's alleged "immoral" conduct (R. 161). The Superintendent gave no details of that episode. But there is no record of any complaints by anyone against petitioner. She was informed by her principal that she would be recommended for the 1962-63 school year on March 21, 1962 (R. 60). Her principal made no mention of petitioner's husband's arrest of March 3, 1962, or his conviction in the Justice of the Peace Court on March 14, 1962. Obviously, the principal had no doubts about the irrelevance of her husband's difficulties to petitioner's worth as a third grade teacher. The high esteem in which petitioner's principal, supervisor and the Negro community continue to hold her demonstrates that the Superintendent's fears, upon which the dismissal was purportedly based, were unfounded.

Respondent's conduct must be evaluated in the light of its continued use of an affidavit requirement which this Court held a serious impairment of the teacher's right of free association, *Shelton* v. *Tucker*, 364 U.S. 479, 486, and Mississippi statutes and policies requiring the Board to maintain racial segregation. *Meredith* v. *Fair*, 305 F.2d 343 (5th Cir. 1962), *cert. den.*, 371 U.S. 828; *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir. 1963); *Evers* v. *Jackson Municipal Separate School District*, 328 F.2d 408 (5th Cir. 1964).

In *Meredith* v. *Fair*, 305 F.2d 343, 360 (5th Cir. 1962), *cert. den.*, 371 U.S. 828, the Court set standards of review: "to study the case as a whole, weighing all of the evidence and rational inferences in order to reach a net result; . . ." and "to consider the immediate facts in the light of the institution's past and present policy on segregation, as reflected not only in the evidence but in statutes and regulations, history and common knowledge; . . ." Notwithstanding the State's strenuous assertions that Meredith's application was denied because of (a) an alleged false voter registration, (b) psychological problems, and (c) a bad character risk, the court, rejected the State's reasons as "frivolous" and "trivial". The Court concluded he was rejected because of his race. 305 F.2d at 361. Compare *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963); *Lombard* v. *Louisiana*, 373 U.S. 267 (1963); *Robinson* v. *Florida*, 378 U.S. 153 (1964).

Similar standards should be applied here. The lower court's conclusion that "There are no racial or civil rights overtones in this record . . ." (R. 205) flies in the face of what the court has frequently judicially noticed about Mississippi's racial policy under the truism "what everybody knows the court must know." *Meredith* v. *Fair*, *supra* at 344-45. By its failure to take notice of this policy,

and refusal to hear evidence about it, the lower court condemned this case to "the eerie atmosphere of never-never land," *Meredith* v. *Fair,* 298 F.2d 696, 701 (5th Cir. 1962). This case should be recognized for what it is—a punishment of Mrs. Henry for her civil rights views and her husband's. Nothing else reasonably accounts for the fact than an admittedly experienced and capable teacher has been deprived of an opportunity to work in her profession for four years. We urge the Court to pierce the veil which disguises this discrimination as was done in such cases as *Garner* v. *Louisiana,* 370 U.S. 248; *NAACP* v. *Button,* 371 U.S. 415, 445 (Justice Douglas concurring); and *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 99 (Justice Fortas and the Chief Justice, concurring).

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
DERRICK A. BELL, JR.
10 Columbus Circle
New York, New York 10019

R. JESS BROWN
125½ North Farish Street
Jackson, Mississippi

Attorneys for Petitioner

APPENDIX A

Miss. Code Annot. 1942 (Cum. Supp. 1960)

§ 6282–41. Superintendents, principals, and teachers to file affidavit as to membership in organizations.

No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the trustees of the district operating such school, and no instructor, professor or other teacher shall be employed or elected in any junior college or institution of higher learning, or other educational institution supported wholly or in part by public funds, by the trustees or governing authority thereof until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor, professor, or other teacher shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations of which such superintendent, principal, teacher, instructor, professor, or other teacher is, or within the past five (5) years, has been a member, or to which organization such superintendent, principal, teacher, instructor, professor, or other teacher is presently paying, or within the past five (5) years has paid, regular dues or to which the same is making, or within the past five (5) years, has made regular contributions.

§ 6282–42. Form of affidavit.

Such affidavit may be in substantially the following form:

STATE OF .....
COUNTY OF .....

I, ... (name of affiant), being an applicant for the position of ..... at ..... (name of school

or institution), being first duly sworn, do hereby depose and say that I am now or have been within the past 5 years a member of the following organizations and no others:

.....

.....

(names and addresses of organizations)

and further, that I am now paying, or within the past five (5) years have paid, regular dues or made regular contributions to the following organizations and no others:

.....

.....

(names and addresses of organizations)

.....

(Signature of Affiant)

.....

Affiant

Sworn to and subscribed before me, this the ..... (date) day of ..... (month), 19..... (year).

.....

(Signature of Official)

.....

Title of Official

Appendix A

§ 6282–43. Contracts of employment void for failure to file affidavit.

Any contract entered into by any board of trustees of any school district, junior college, institution of higher learning, or other educational institution supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in section 1 [§ 6282–41] hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendants therein and upon the official bonds made by such defendants, if any such bonds be in existence.

§ 6282–44. Penalty for filing false affidavit.

Every person who shall wilfully file a false affidavit under the provisions of this act shall be guilty of perjury, shall be punished as provided by law, and in addition, shall forfeit his license to teach in any of the schools, junior colleges, institutions of higher learning, or other educational institutions supported wholly or in part by public funds in this state.

Appendix A

§ 6282–45. Constitutionality.

If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitutionality shall not affect any other portion of this act; nothing herein contained, however, shall be construed so as to affect the validity of any contract entered into prior to the effective date of this act.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21438

NOELLE M. HENRY,

Appellant,

—v.—

COAHOMA COUNTY BOARD OF EDUCATION, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

(December 3, 1965.)

Before:

HUTCHESON and BROWN, *Circuit Judges,*
and MORGAN, *District Judge.*

Per Curiam:

This is an appeal from a judgment of the United States District Court for the Northern District of Mississippi, denying plaintiff the relief she sought in her suit to require by injunction that she be re-employed as a teacher in the Public School System of Coahoma County, Mississippi.

Appellant, Mrs. Henry, is a negro school teacher who has taught in the same school for eleven years. In Missis-

sippi teachers have no tenure but are hired on one year contracts which are reviewed for renewal each year. The usual or ordinary, indeed the required, procedure is that the teacher's principal or supervisor make his recommendation for renewal to the County School Superintendent, and the superintendent in turn makes his recommendation to the School Board. It is statutory in Mississippi[1] that the School Board cannot hire anyone not recommended by the County Superintendent. It is also required by statute that all teacher applicants list all organizations to which they do belong or have belonged or to which they have contributed money for the past five years. Mrs. Henry was, and is, a member of the National Association for the Advancement of Colored People and also the only teacher to so state on her application. Although she was recommended by her supervisors to Hunter, the County Superintendent, Hunter did not recommend her, and her contract was not renewed for the 1962-1963 school year.

Mrs. Henry testified that she made three separate attempts to obtain an explanation from Hunter or the School Board as to the basis of the refusal to renew her contract, but each time Hunter told her the Board had made the refusal and had given him no reason therefor and that further discussion of the matter would be useless. She filed suit, stating as the basis for her complaint that the Board had refused to renew her contract because she was a member of the National Association for the Advancement of Colored People and because her husband was and is President of that Association in Mississippi. Relief prayed for was that the Board be enjoined from refusing to renew her contract for 1962-1963 and that the

[1] See Lott v. State, 121 So.2d. 402.

statute requiring teacher applicants to list their organizational activities be declared unconstitutional.

At the trial Hunter testified that the Board had not renewed the contract because he had not recommended Mrs. Henry. When questioned by the court, he stated that his refusal to recommend her was based on the fact that her husband had been convicted on a morals charge and had suffered an adverse judgment in a libel suit, and that he had reliable information that suit was about to be filed against Mrs. Henry in respect of a fraudulent conveyance made to her by her husband. Hunter expressly testified that his decision was not due to Mrs. Henry's or her husband's civil rights activities or any N.A.A.C.P. affiliations.

At the conclusion of the hearing the Court ordered a time for filing memorandum briefs. During this time Mrs. Henry moved to amend her complaint under Rule 15(b) to conform to the reasons given by Hunter as a basis for his refusal to recommend her. The district judge refused to allow the amendment on the basis that it would change the entire character of the case. Also he pointed out that the evidence which formed the basis for the motion was elicited by questions from the court and that it came in over the objection of the plaintiff; that with notice this point could be much more fully developed since neither side had come prepared on this issue, and to allow the amendment at that late date would be to do so without such development. However, the judge stated that in the event of appeal, in order that the appellate court might have the benefit of the lower court's views in this aspect of the case, he had dealt with the case as if the motion to amend had been granted.

Judgment was entered, refusing to enjoin the Board on the basis that Mrs. Henry had failed to sustain her burden

of proof that the refusal to renew her contract was due to her civil rights activities. On the contrary, the finding was that the Board was without authority to renew the contract due to Hunter's failure to recommend Mrs. Henry, and thus was not properly a party to the suit. Further the court found that the reasons to which Hunter testified constituted good cause and that he exercised sound discretion in not recommending Mrs. Henry for re-employment. The court refused to rule on the constitutionality of the statutory requirement that teachers list their organizational activities, stating that: "Inasmuch as plaintiff in her present status as a non-teacher is not affected by this requirement, this issue is now moot".

The district judge filed a full opinion,[2] stating the facts and issues and the reasons and grounds for his findings, decision and judgment.

We agree with his decision and judgment and adopt his opinion as our own, and, because we do, it will be unnecessary for us to repeat or discuss further his findings and conclusions. It will be sufficient to say that we approve and adopt his opinion and the findings and conclusions stated in it and order the judgment AFFIRMED.

BROWN, Circuit Judge, Concurring.

In joining in the affirmance, I would emphasize two things about the Court's decision. First, though the Superintendent may have broad discretion in recommending or refusing to recommend a teacher for employment by the Board, the Court recognizes that this discretion does not prevent judicial inquiry into the constitutional propriety of his motives in refusing to recommend Plaintiff. See *Hornsby* v. *Allen*, 5 Cir., 1964, 326 F.2d 605, re-

[2] Henry v. Coahoma County Board of Education, et al., —— F.Supp. ——.

hearing denied, 330 F.2d 55. Discretion gives much power, but this power may never be used to interfere with, or discourage, the exercise of federally guaranteed civil rights including the right to persuade or encourage others in the exercise of their civil rights. *United States* v. *Bruce*, 5 Cir., 1965, —— F.2d —— [No. 22028, Nov. 16, 1965]; see *United States* v. *Board of Educ. of Green County, Miss.*, 5 Cir., 1964, 332 F.2d 40. Second, though a teacher's husband's criminal record and involvement in litigation undoubtedly in many cases may justify a refusal to recommend her for this sensitive employment, if in fact such a record and such involvement spring wholly from attempts by him to exercise these broadly defined civil rights, then under such circumstances these considerations would not justify a refusal to recommend either under the exercise of—or the guise of exercising—such discretion.

The Court affirms because the Plaintiff failed to prove either that the Superintendent's refusal to recommend her was based on the civil rights activity of her or her husband, or that her husband's criminal record, which the Superintendent did consider, arose primarily from constitutionally protected assertions of civil rights.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 21438

D. C. Docket No. 43-62

NOELLE M. HENRY,

Appellant,

—v.—

COAHOMA COUNTY BOARD OF EDUCATION, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Before:

HUTCHESON and BROWN, *Circuit Judges,*
and MORGAN, *District Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

Judgment

It is further ordered and adjudged that the appellant, Noelle M. Henry, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 3, 1965

Brown, Circuit Judge, Specially Concurs.

Issued as Mandate: Jan. 12, 1966

On Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21438

NOELLE M. HENRY,

Appellant,

—v.—

COAHOMA COUNTY BOARD OF EDUCATION, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

(January 4, 1966)

Before:

HUTCHESON and BROWN, *Circuit Judges,*
and MORGAN, *District Judge.*

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

U. S. COURT OF APPEALS

FILED

JAN. 4, 1966

EDWARD W. WADSWORTH
CLERK

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1182

NOELLE M. HENRY,
Petitioner,

vs.

COAHOMA COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAM H. MAYNARD
Stevens Building
Clarksdale, Mississippi

JOE T. PATTERSON
Attorney General of the State of Mississippi
Jackson, Mississippi

WILL S. WELLS
Assistant Attorney General of the State of Mississippi
New Capitol Building
Jackson, Mississippi

Attorneys for Respondents

E. L. MIDDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1182

NOELLE M. HENRY,
Petitioner,

vs.

COAHOMA COUNTY BOARD OF EDUCATION, PAUL M. HUNTER, SUPERINTENDENT, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE COAHOMA COUNTY BOARD OF EDUCATION AND PAUL M. HUNTER, SUPERINTENDENT, ET AL., IN OPPOSITION TO PETITION FOR CERTIORARI

PRELIMINARY STATEMENT

This case was decided originally in favor of respondents by District Judge Claude F. Clayton in an opinion rendered on December 23, 1963, and attached hereto as Appendix A. This opinion of Judge Clayton was unanimously sustained by the Fifth Circuit Court of Appeals on Decem-

ber 3, 1965, which opinion is contained in Appendix B of brief of petitioner.

JURISDICTION

The judgment of the Court of Appeals was entered December 3, 1965. Petition for rehearing was denied January 4, 1966. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

On page 2 of the brief of petitioner counsel states two questions which they say are presented in this case, but an examination of said statement will show that they are argumentative rather than factual. Respondents take the position that the only question presented is as to whether the refusal of the Superintendent of Education of Coahoma County, Mississippi, to recommend the employment of petitioner was because of any reason, or reasons, which would deprive petitioner of any constitutional rights. This point is cogently decided against petitioner in the concurring opinion of Circuit Judge Brown of the Fifth Circuit Court of Appeals where he states the question and then answers it by saying:

> "The Court affirms because the plaintiff failed to prove either that the Superintendent's refusal to recommend her was based on the civil rights activity of her or her husband, or that her husband's criminal record, which the Superintendent did consider, arose primarily from constitutionally protected assertions of civil rights."

STATEMENT OF THE CASE

Before entering into a discussion of the facts of this case, the respondents will point out certain salient facts which petitioner fails to reveal and certain erroneous inferences in which petitioner indulges. Throughout the brief of petitioner her counsel has either affirmed openly, or strongly inferred, that this case involves race issues and its following sequences of violation of civil rights of petitioner.

The facts disclose, as found by both lower courts, that no activities of petitioner nor her husband in NAACP had anything to do with the failure of the Superintendent of Education of Coahoma County School District to recommend petitioner as a teacher. The facts also disclose, as found by both the District Court and the Circuit Court of Appeals, that the reasons assigned by the Superintendent of Education for not recommending the re-employment of petitioner had no relation to any civil or constitutional rights of petitioner, as the civil rights activities on the part of the petitioner and her husband did not enter into the decision of the Superintendent of Education not to recommend the re-employment of petitioner.

STATEMENT OF FACTS

The statement of facts contained in the brief of petitioner is such a combination of facts and argument and so completely sketchy that we will make a brief statement of facts.

In the trial in the District Court, the first witness called by petitioner's attorney was Noelle M. Henry.

This witness testified that she was a Negro teacher in the McCloud School of the Coahoma County School District and had no white pupils in the school. She then went on to review her general teaching activities and training, and in addition some of her outside activities generally connected with the community or the school. She stated that she had always operated under a one year teaching contract from the Coahoma County School Board, and that her last contract had expired at the end of the 1961-1962 school year. She stated that the general method of employment for teachers had been that the principal would recommend, or not recommend, a teacher to the supervisor and the supervisor in turn would inform the Superintendent of Education as to her recommendation.

She stated that she learned that she was not recommended by Superintendent of Education Paul M. Hunter for employment as a teacher for the school year 1962-1963, and that she sought conferences with the appellee Board without success.

In discussing the activities of her husband and herself in the NAACP she said that her husband had been State President since 1953, and that he spent quite a good deal of work in this position. She testified that she was a member of the NAACP (R. 27), but had not been in the school year 1961-1962 (R. 30). She was asked:

> Q. Are you familiar with the NAACP as far as the investigation into the school system is concerned?
>
> A. Yes, I am.
>
> Q. Generally, what is the policy?
>
> A. The policy is that the NAACP doesn't mess in the segregated schools.
>
> Q. Does your husband to your knowledge take any action in regard to segregated schools in the Coahoma District?

A. No, he hasn't taken any action.

Q. Has he taken any action in regard to segregated schools in the City of Clarksdale?

A. No, he hasn't. (R. 27 and 28).

She stated that in 1955 or 1956 he did sign a petition seeking for desegregation of the city schools but had done nothing with regard to segregated schools since that time in his position in the NAACP.

When asked if she were active in the NAACP, she went back to her teaching period and said "I didn't have time to be active in the NAACP." (R. 74).

On Record page 75 she stated that for several years she had listed her NAACP affiliation in her statutory affidavit. The record will show that in only one of the last two or three years did she list NAACP activities and then she wrote in parenthesis "Inactive".

On cross-examination she stated that except for a skip of one year she had worked eleven years as a teacher.

She admitted that all of her teaching contracts had been for one year with no renewal clause, and that each one had been properly carried out by her and properly carried out by the Superintendent of Schools. She stated that her last contract had expired in May 1962 and that the School District had lived up to all the terms of their contract.

Charles Ball, School Principal, and Geraldine White, School Supervisor, both testified generally as to the fact that they recommended plaintiff for reemployment for the school year 1962-1963.

Lillian Rogers Johnson, a former Supervisor of Negro Schools of Coahoma County, Mississippi, stated that she

retired from the position on January 1, 1961. She stated that plaintiff was a good teacher. She went on further to say that at one time Mr. L. L. Bryson, who was then Superintendent of Education, had questioned whether he should reemploy Noelle Henry, appellant, because of her husband who had at one time signed a petition asking for desegregation of the city schools. However, she stated that he did sign the contract with Noelle Henry with no qualifications or conditions.

Paul M. Hunter, Superintendent of Education, was next called as an adverse witness. He stated that during his campaign for election that the question of segregation did not enter into said campaign. He stated that there were approximately 200 teachers in the Coahoma County School District, and that all white teachers taught in the white schools and all Negroes in the Negro schools. He stated that he did not recommend to the Board of Education that it employ appellant for the 1962-1963 school year.

He stated that he knew that appellant was active in NAACP. On questioning, he gave no opinion as to whether or not the overwhelming majority of those voting in Coahoma County wanted to maintain segregation. At one point in the questioning the following remarks and testimony were given:

The Court, addressing himself to attorney for plaintiff asked: "Why don't you ask this witness why he failed to recommend the plaintiff?"

"Mr. Bell: I think that is part of the other side's case. I would prefer they do it if they want to. I think we do know he failed to recommend her and try—tried to make the record show that to the strongest extent possible.

"The Court: Why don't you ask him why he failed to recommend her, or if he failed to recommend her because she was a member of the NAACP?

"Mr. Bell: Our position is that he did and that this kind of question resulted.

"The Court: (To witness) Did you fail to recommend the plaintiff because she was a member of the NAACP?

"The Witness: I did not.

"The Court: Why did you take such action?

"The Witness: Because of the activities that she and her husband were engaged in were highly controversial." (R. 109).

Without going into detail, the reasons given were that at the time the recommendation was withheld the husband of appellant had been convicted of a morals charge, and had a libel suit filed against him by the Chief of Police of the City of Clarksdale, Mississippi, and another libel suit filed against him by the County Prosecuting Attorney of Coahoma County, and that the witness had been advised on reliable authority that a fraudulent conveyance suit against appellant and her husband charging that he had fraudulently transferred property to her would be filed. Under those conditions the witness concluded that the employment of appellant would have a bad influence on the children she taught and other teachers.

Mr. S. B. Wise, President of the appellee Board, who was called as an adverse witness, stated that in answer to interrogatories, he had answered the question regarding the qualifications of the teacher who replaced appellant that she had an A-e license, 0 years experience.

Mr. Paul Hunter was then called by appellees and identified the records which showed that no recommendation had been made to appellee Board for employment of appellant. He also identified certain contracts and minutes which it is unnecessary to discuss here. He reiterated his position that the activities of appellant or her husband

in NAACP had nothing to do with his decision not to recommend her for employment. This concluded the testimony.

DISCUSSION OF OPINIONS BELOW

Before entering into a discussion, or analysis of the opinions below, we make the following legal observations.

In *36 C.J.S.*, Vol. 36, page 660, Sec. 204 (16 of Federal Courts) it is stated that:

> "With respect to questions of local law, the Supreme Court will not ordinarily decide such matters independently or in the first instance, but will look to the trial court for aid."

In the case of *Skelly Oil Co. et al.* v. *Phillips Petroleum Company*, 339 U.S. 667, 94 L. Ed. 1194, which is one of the many cases affirming and re-affirming that legal principle, the Supreme Court decided that it would not re-examine a question of local law determined by the courts below, stating on page 1201 of said opinion:

> "This contention was rejected below, and we do not re-examine the local law as applied by the lower courts."

Again in *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 95 L. Ed. 479, this Court said at page 482:

> "Certiorari is granted 'only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal'."

With reference to this quotation, we submit that this case presents no matter of public interest but is merely a

case of a school superintendent not recommending for re-employment a school teacher with no civil nor constitutional rights being involved.

Another legal observation which is pertinent is that contained in 36 *C.J.S., Federal Courts,* Sec. 204(25), at page 673, where it is said:

> "The burden of showing in what respect the judgment under review is erroneous rests on the party bringing it to the Supreme Court for review * * *"

quoting *Higgins* v. *Carr Bros. Co.*, 317 U.S. 572, 87 L. Ed. 468, among other cases.

Applying the above stated principles to the facts at hand,

1) The District Judge and the Circuit Court of Appeals by unanimous agreement concluded that the case of *Lott* v. *State,* 239 Miss. 97, 121 So.2d 402, was correct in deciding that where no violation of constitutional rights was involved, that the recommendation of re-employment of a teacher in a school system such as is present here lies within the entire discretion of the superintendent of education.

2) That no constitutional rights of petitioner were violated by the Superintendent of Education of Coahoma County School District by not recommending her for re-employment as a teacher.

To sustain our position set forth above, we refer directly to the opinion of the Circuit Court of Appeals in this case where it was stated:

> "The district judge filed a full opinion, stating the facts and issues and the reasons and grounds for his findings, decision and judgment.
>
> "We agree with his decision and judgment and adopt his opinion as our own, and, because we do, it will

be unnecessary for us to repeat or discuss further his findings and conclusions. It will be sufficient to say that we approve and adopt his opinion and the findings and conclusions stated in it and order the judgment AFFIRMED."

For that opinion we refer directly to the opinion of District Judge Claude F. Clayton, which is contained in Appendix A to this brief.

In dealing with the question as to whether or not appellant should have been allowed, under Rule 15 (b), *Federal Rules of Civil Procedure,* to conform to the evidence by adding additional grounds for the relief sought, the Court noted that said original ground was the allegation that appellant was deprived of certain constitutional rights because of her Civil Rights activities, and the Court stated on page 199 of the Record:

"Plaintiff and her husband are both Negroes and the suit as originally filed was predicated on the theory that defendants did not re-employ plaintiff because of her activities and the activities of her husband in the field of civil rights for members of the Negro race. While the underlying purpose of the rule is to permit final disposition of a case on the evidence rather than on pleadings, this proposed amendment would in fact almost entirely change the character of the case. In addition, here we are confronted with a peculiar situation which presents a serious problem of notice and an opportunity to be heard with a full and fair opportunity to develop evidentially the point of inquiry now raised as an issue in the case for the first time by the motion to amend, several days after the hearing was over. The evidence which forms the basis for the motion came into the case in response to questions from the bench. It did not result from nor was it developed by questions from counsel. And, it came in over objection by plaintiff.

> "It was then and is now quite obvious that neither side had prepared to try the case with this area of inquiry in mind. It was equally apparent that neither side at the hearing considered that the Court's inquiry had injected a new issue into the case. With reasonable notice there can be little doubt but that this aspect of the controversy could be much more fully developed."

The Court in rejecting appellant's motion stated that "Modern concepts of justice under our notice practice seem to dictate, in this situation, with the incomplete development of this area of inquiry, that the amendment be not now, at this late date, allowed", citing Barron & Holtzoff, *Federal Practice & Procedure,* Vol. 1-A, Section 449, page 792, to the effect that:

> "As has been pointed out earlier, however, fair notice remains essential, and pleadings will not be deemed amended to conform to the evidence because of a supposed 'implied consent' where the circumstances were such that the other party was not put on notice that a new issue was being raised * * *. The right to amend to conform to proof is necessarily dependent upon the individual facts and circumstances."

However, the Court went further to hold that the case would be dealt with "just as if the plaintiff's motion to amend had been sustained here." (R. 200).

The Court also held that *Lott* v. *State,* 239 Miss. 97, 121 So.2d 402, was controlling, and that the Board of Education, whose members are a party here, "had no power under the statute to employ the appellant as a teacher", stating: "Hence the Board was without any authority to employ her and should not, therefore, properly be in this case." (R. 202).

The Court then said:

> "Thus, it would appear here that the superintendent has good cause and exercised a sound discretion, and that his actions should not now be overturned." (R. 204).

As this Court will note, the opinion of the Lower Court was judicially sound and well reasoned, and we submit that the conclusions on the law and facts should be upheld.

As this Court has well observed, the Circuit Court of Appeals stated unequivocably in regard to the decision of Judge Claude F. Clayton that:

> "We agree with his decision and judgment and adopt his opinion as our own, and, because we do, it will be unnecessary for us to repeat or discuss further his findings and conclusions. It will be sufficient to say that we approve and adopt his opinion and the findings and conclusions stated in it and order the judgment AFFIRMED."

ARGUMENT OPPOSING PETITION FOR WRIT OF CERTIORARI

We shall discuss the positions asserted by petitioner in the order in which they are presented.

1. The denial of employment to petitioner was not arbitrary nor in violation of her rights under the Fourteenth Amendment.

Petitioner in the Circuit Court of Appeals contended that the lower court erred in refusing to allow petitioner to amend her complaint to conform to the evidence at the trial, which in effect was a motion to allow petitioner to introduce evidence as to the stated reasons of the Superintendent of Education of Coahoma County School District

as to his failure to recommend the employment of petitioner several days after the conclusion of the trial of this case in the lower court, and after the lower court had requested counsel for briefs on the merits.

In general the amendment sought was to add to the pleadings the allegation that appellant was not employed because of criminal and civil suits against her husband and her alleged participation in a fraudulent conveyance suit.

None of these allegations were contained in the original complaint and the relief therein sought was predicated solely on allegations that the NAACP activities of appellant and her husband were the reason for the Superintendent of Education not recommending appellant as a teacher.

Appellant indicates that the evidence necessitated her motion to amend, and was introduced by appellees, but this is not a fact. This evidence was not raised by appellees but was given in response to questions by the lower court (R. 109). Also, it should be noted that this testimony was introduced over the objection of appellant, and that at no point in the trial did appellant seek to amend her complaint to include this evidence as a part of said complaint.

We concede that Rule 15 (b) of the *Federal Rules* is quite broad in its scope and generous in its allowance. However, we do not believe that this rule is broad enough to allow a litigant to completely change the theory of his or her lawsuit after the completion of the trial and submission to the Judge without having given any previous indication that such theory was to be changed. As stated in *Barron & Holtzoff, Federal Practice & Procedure,* Vol. 1-A, Section 449, page 792:

> "As has been pointed out earlier, however, fair notice remains essential, and pleadings will not be deemed amended to conform to the evidence because of a supposed 'implied consent' where the circumstances were such that the other party was not put on notice that a new issue was being raised * * *. The right to amend to conform to proof is necessarily dependent upon the individual facts and circumstances."

In our particular case we were given not the slightest notice that this was a new issue which was being raised. On the contrary it will be seen from the Record that the attorney for appellant not only did not raise this issue on the trial but objected to the testimony which he now contends should be used as the basis of a different lawsuit.

It should be particularly noted that this testimony was secured on questioning by the lower court and that appellant (petitioner here) at no time indicated that she considered that said testimony should have been new material bearing on the decision of the case.

In addition to the fact that the allowing of this amendment would raise a new issue after the trial and conclusion of the case is that said amendment contained allegations which would not be competent as evidence because, as argued in our brief on the merits, the reasons for the Superintendent of Education not recommending a person for employment as a teacher are not subject to judicial review. See *Lott* v. *State,* (Miss.) 121 So.2d 402.

We, therefore, respectfully submit that appellant's delayed motion to amend pleadings to conform to the evidence was properly denied. See discussion in this brief of District Court's opinion.

With no thought of disrespect, but for the purpose of some clarity we submit that petitioner's arguments un-

der Nos. 1 and 2 as set forth in pages 9 to 14, and 15 to 21, of petitioner's brief, merge into each other, and not only merge into each other, but are so vague as to cause difficulty in interpreting properly. Thus in this brief, we hereinafter set forth our position in this case.

The fundamental and alternative positions of respondents are:

1) The Respondent Board cannot be enjoined to employ petitioner.

2) The Superintendent of Education cannot be controlled in his recommendations, or non-recommendations, of teachers to be employed in a county-wide school district where no constitutional right is involved.

3) If this Court were to hold that the discretion of the Superintendent of Education could be controlled, and that a failure to recommend petitioner for employment because hers and her husband's NAACP activities deprived her of civil rights, then petitioner's case should not be sustained as she completely failed to show that any NAACP activities of either herself or her husband influenced the Superintendent of Education in his decision not to recommend her as a teacher.

4) If the Court should allow the pleadings to be amended as requested by petitioner, and were to hold that the reasons for not employing petitioner should be considered, then respondents submit that said reasons were completely sufficient.

We shall discuss the above points in the order stated.

1) The Respondent Board cannot be enjoined to employ petitioner.

It is stipulated that the Board of Education is the controlling board for the Coahoma County School District,

which is a county-wide school district as that term is defined under Mississippi law, and comprises all of the territory of Coahoma County, Mississippi, outside of the territory embraced within the Clarksdale Municipal Separate School District, whose boundaries are co-extensive with the boundaries of the City of Clarksdale, Mississippi. The law applicable to the employment of teachers in such districts is contained in Sections 6328-07 and 6328-21, of the *1942 Code of Mississippi, Recompiled.* (See petitioner's brief.)

These sections provide that the board of education of a county-wide school district such as the one here can only employ a teacher for its school district on the recommendation of the superintendent of education. In the case at hand, the Superintendent of Education did not make such recommendation and it follows that the respondent Board under the applicable Mississippi law was and is powerless to employ any applicant for a teacher's position in its district.

In *Lott* v. *State,* (Miss.) 121 So.2d 402, the Supreme Court expressly decided that the board of education had no power to employ a teacher not recommended by the superintendent of education.

We, therefore, respectfully submit that respondent Board was not a proper party to this action.

2) The Superintendent of Education cannot be controlled in his recommendations, or non-recommendation, of teachers to be employed in a county-wide school district.

It is a legal principle which needs no citations of authorities that unless such law contravenes the Constitution of the United States, or the state involved, that each state can provide for its own educational process.

Under the laws of the State of Mississippi it is provided, as previously stated, that before a teacher may be employed in a county-wide school district it is necessary that the superintendent of education recommend such teacher. These provisions of law were tested in the Mississippi case of *Lott* v. *State,* (Miss.) 121 So.2d 402.

In that case a suit was brought by an applicant for the position of school principal to require the county superintendent of education to enter into a contract with him to serve as principal of a school attendance center. It should be here observed that the statutes governing the employment of principals are identical in text for those of employing teachers.

The facts showed that the superintendent of education had previously recommended a man as said principal but the board of education refused to approve him, and further showed that the board, without the recommendation of the superintendent, had approved a Mr. Kelly.

The next relevant record on the minutes is the recitation that the county superintendent recommended in succession three different persons to serve as principal but the board found they were not suitable or qualified. The statement of facts shows further that the undoubted reason the superintendent failed to recommend Mr. Kelly was because he had entered into political criticisms which were not approved of by the superintendent.

The Court held that the statutes in Mississippi contemplated that in county-wide school districts the county superintendent of education has the exclusive right to recommend to the county board of education the principals to be employed, and that said recommendation is a matter of complete discretion with the superintendent.

In discussing the reasons for failure of the superintendent to so recommend in this case the Court said on page 406 of its opinion:

> "Although political and factional considerations should not enter into a recommendation by a county superintendent and an approval by a county board, it is not a judicial function to determine the extent to which those factors affected Lott and the board."

Thus the Supreme Court of Mississippi in this case firmly established the principle that it is not a subject of judicial inquiry as to the reasons a superintendent of education does not recommend a principal or teacher for employment in his school system.

The principle of law is too well established to need confirmance by citation of authorities that the decisions of a supreme court of a state's interpretation of its statutes are binding upon federal courts.

Title 28, *U.S.C.A.*, Section 1652, provides that:

> "The laws of the several states, except where the Constitution or treaties of the United States, or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply."

In addition to the *Lott* case, *supra*, we have in support of our position the unbroken lines of decisions of the United States Supreme Court to the effect that it is not within the scope of judicial power to make contracts for parties.

Monrosa v. *Carbon Black Export, Inc.*, 359 U.S. 180, 3 L. Ed. 2d 723, 79 S. Ct. 710.

Memphis & L. R. R. Co. v. *Southern Export*, 117 U.S. 1, 29 L. Ed. 791, 6 S. Ct. 542.

United States Supreme Court Digest, Annotated, Vol. 5, page 743, Contracts, Section 57.

In a later portion of this brief we shall discuss the authorities cited by petitioner with reference to her contention that a court should inquire into the reasons for the refusal of a superintendent to recommend a person for employment as a teacher.

3) If this Court were to hold that the discretion of the Superintendent of Education could be controlled, and that a failure to recommend appellant for employment because hers and her husband's NAACP activities deprived her of civil rights, then appellant's case should not be sustained as she completely failed to show that any NAACP activities of either herself or her husband influenced the superintendent of education in his decision not to recommend her as a teacher.

We have taken and still maintain the fundamental contention that inquiry into the reasons for a superintendent of education not recommending a person for employment as a teacher are not subjects of judicial inquiry. If this Court holds that we are mistaken in that position, then we submit that petitioner has failed completely to maintain the position set forth in her original complaint.

As heretofore noted, the entire basis for that complaint was that the Superintendent had refused to recommend petitioner as a teacher because of hers and her husband's activites in the NAACP. We need not review the evidence in the case to support our position to the contrary as the Court is very familiar with said evidence. However, we would like to note in passing that in addition to the fact that the Superintendent denied that such activities constituted a reason for his non-recommendation of petitioner, that there is not one word of evidence which would support petitioner's contention that said activities were a reason.

We likewise reiterate our position that even in her complaint petitioner did not allege facts which would indicate that any civil rights of hers within the meaning of the statutes were violated.

We submit that petitioner completely failed to sustain her stated claim.

4) If the Court should allow the pleadings to be amended as requested by appellant, and were to hold that the reasons for not employing petitioner were competent evidence, then respondents submit, that said reasons were completely sufficient.

Although we continue to maintain that the reasons for the Superintendent not recommending employment of petitioner are not the subject of judicial inquiry, we, nevertheless, say that if they are, that said reasons were sufficient.

In answer to questions asked by the Lower Court, the Superintendent, in summary, stated that the reasons for his refusal to recommend petitioner for employment were, first, that the husband of petitioner had been convicted in a court of record of a morals charge; second, that libel suits were pending against the husband of petitioner by the Chief of Police of the City of Clarksdale, Mississippi, and the Prosecuting Attorney of Coahoma County, Mississippi; and, third, that said Superintendent had been reliably informed that a suit was to be filed against petitioner and her husband alleging that fraudulent conveyances had been made by said husband to petitioner.

The Superintendent stated that if petitioner were employed as a teacher, that all the above factors would "be a bad influence on the children and other teachers".

As noted by petitioner in her brief, it was stated in *Adler* v. *Board of Education*, 342 U.S. 485, 96 L. Ed. 517:

> "A teacher works in a sensitive area in a school room. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps."

It seems manifest that the reasons assigned by the Superintendent were sufficient for him, acting within his sound discretion, to follow. The fact that the husband of petitioner was involved in a morals charge, in litigation with a chief of police and a county prosecuting attorney, and that the petitioner would in all likelihood be sued on a fraud charge, would certainly weaken petitioner's position as a teacher of children.

To hold that a court could judge finally the sufficiency of such reasons would naturally be to hold that the superintendent of education could not refuse to recommend for employment for reasons not approved of by the Court. In fact, this would give the courts complete control over the discretion of such superintendents, and we submit that such is not and should not be the law.

We thus submit that, first, the reasons for said non-recommendation in view of the fact that no civil nor constitutional rights were involved, cannot be inquired into by a court, and, second, if they can, they were sufficient.

ANSWER TO AUTHORITIES OF PETITIONER

Counsel for petitioner cites *Wieman* v. *Updegraff*, 344 U.S. 183, to assist position of petitioner. This case is in no way in point in that it involved the discharge of a teacher rather than a failure to employ a teacher, which is the situation in our case. Although counsel for petitioner erroneously states in the index of its brief, and Part II on page 15 of its brief, that petitioner was discharged this, of course, is not the fact, as counsel well knows and admits on page 10 of its brief.

As another illustration of cases cited by petitioner is the case of *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, which is similar to *Shelton* v. *Tucker*, 364 U.S. 398 where the situation presented was a teacher refusing to sign an oath with reference to his activities. This is not the case here presented.

Petitioner likewise cites to support her position *Torcaso* v. *Watkins*, 367 U.S. 488. This case could not possibly have an application to the issue in our case as it merely held that a state cannot disbar a man from state office because he did not swear he believed in God.

Schware v. *Board of Bar Examiners*, 353 U.S. 232.

We submit that this case likewise has no bearing to the case at hand in that it merely states that a state could not make arbitrary standards for admission to the Bar.

Practically all of the other cases cited by petitioner dealt with the discharge of a public employee rather than the refusal to employ persons as public employees which is the fact of our case.

CONCLUSION

In opposing the bid for certiorari, we are fortified with the findings of fact and law on the trial before Honorable Claude F. Clayton, and the unanimous vote of the Justices of the United States Court of Appeals for the Fifth Circuit.

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

JOE T. PATTERSON
Attorney General of the State of Mississippi
New Capitol Building
Jackson, Mississippi

WILL S. WELLS
Assistant Attorney General of the State of Mississippi
New Capitol Building
Jackson, Mississippi

WILLIAM H. MAYNARD
Stevens Building
Clarksdale, Mississippi
Attorneys for Respondents

By: William H. Maynard
Of Counsel

William H. Maynard was admitted to practice in the Supreme Court of the United States on January 8, 1936

CERTIFICATE

The undersigned, one of counsel for Respondents, hereby certifies that on this the ..... day of May, 1966, he served counsel for petitioner, R. Jess Brown, 125½ North Farish Street, Jackson, Mississippi, and Jack Greenberg, James M. Nabrit, III and Derrick A. Bell, Jr., 10 Columbus Circle, New York, New York 10019, with copies of Respondents' brief by mailing the same to the above addresses by United States mail, postage prepaid.

William H. Maynard

WILLIAM H. MAYNARD

Of Counsel for Respondents

APPENDIX A

Opinion

Filed December 26, 1963

(Title Omitted.)

Plaintiff filed her complaint against the County Superintendent of Education and the Board of Education of Coahoma County, Mississippi, alleging that the board had failed to rehire her as a schoolteacher for the school year 1962-1963 because she and her husband are and were engaged in certain civil rights activities with goals and objectives contrary to the policies and views of defendants. She seeks injunctive relief to require that defendants rehire her as a teacher. Through informal assistance from the Court and with the cooperation of counsel for defendants technical requirements of process were perfected or in effect waived in order to make the case triable and to avoid any further unnecessary delay. It was heard by the Court sitting without a jury in complaint and answer. At the conclusion of the hearing the Court directed that the case be submitted on memorandum briefs of the parties. Within the time fixed for plaintiff's brief to come in, she moved to amend her complaint under Rule 15 (b), Federal Rules of Civil Procedure, to conform to the evidence by adding as an additional ground for the relief sought allegations that defendants failed to re-employ plaintiff because of her husband's involvement in lawsuits and a criminal prosecution and the possibility that plaintiff would be joined in a suit to set aside as fraudulent conveyances of property made to her by her husband. This motion is opposed by defendants and was taken with the

case for consideration on briefs. That motion will be dealt with first.

Plaintiff and her husband are both Negroes and the suit as originally filed was predicated on the theory that defendants did not re-employ plaintiff because of her activities and the activities of her husband in the field of civil rights for members of the Negro race. While the underlying purpose of the rule is to permit final disposition of a case on the evidence rather than on pleadings, this proposed amendment would in fact almost entirely change the character of the case. In addition, here we are confronted with a peculiar situation which presents a serious problem of notice and an opportunity to be heard with a full and fair opportunity to develop evidentially the point of inquiry now raised as an issue in the case for the first time by the motion to amend, several days after the hearing was over. The evidence which forms the basis for the motion came into the case in response to questions from the bench. It did not result from nor was it developed by questions from counsel. And, it came in over objection by plaintiff.

It was then and is now quite obvious that neither side had prepared to try the case with this area of inquiry in mind. It was equally apparent that neither side at the hearing considered that the Court's inquiry had injected a new issue into the case. With reasonable notice there can be little doubt but that this aspect of the controversy could be much more fully developed.

Second thoughts now make it seem that this Court might have been derelict in not directing a supplemental hearing, with reasonable notice, for the full evidential development of only this one aspect of the controversy. Undoubtedly, if plaintiff had moved promptly to amend at the

close of the hearing such a course of action then would have been followed. Modern concepts of justice under our notice practice seem to dictate, in this situation, with the incomplete development of this area of inquiry, that the amendment be not now, at this late date, allowed.

"As has been pointed out earlier, however, fair notice remains essential, and pleadings will not be deemed amended to conform to the evidence because of a supposed 'implied consent' where the circumstances were such that the other party was not put on notice that a new issue was being raised * * *. The right to amend to conform to proof is necessarily dependent upon the individual facts and circumstances." Barron & Holtzoff, Federal Practice & Procedure, Vol. 1-A, Sec. 449, page 792.

Accordingly, the motion to amend will be overruled.

However, in order that the Court of Appeals may have the benefit of this Court's views with respect to the incomplete development of the "lawsuit" aspect of this case, in the event of an appeal, it will be dealt with just as if the plaintiff's motion to amend had been sustained here.

In order to put all of the questions in this case in proper perspective the statutory system which exists in the State of Mississippi for the employment of all teachers in such a school system as that with which we are concerned in this case must be understood. Briefly, this system is that teachers have no tenure, but are employed on a one year contract basis. These contracts develop by the principal of each attendance center recommending to the county superintendent of education teachers for employment in his school. If the county superintendent agrees with these recommendations, he recommends to the county board of education that the people so recommended be employed for that school as teachers for the next school year.

If the county superintendent does not agree with the recommendations made by the principal, he makes recommendations of his own initiative. In either event the board of education is powerless to employ anyone as a teacher in such a public school system unless that person is recommended by the county superintendent.[1] This question was specifically at issue in the case of Lott v. State, 239 Miss. 97, 121 So.2d 402 (1960), and the Court held clearly that the board of education had no power to employ as a teacher a person not recommended by the superintendent of education.

In Lott, the position at issue was that of principal of an attendance center. For that position the recommendation to the board originates with the superintendent, but the authority of the board is no different.[2] In that case the superintendent recommended one person to the board for employment in the position, but the board undertook to employ another who for political and personal reasons had not been recommended by the superintendent and the superintendent refused to give the board selected person a contract. Suit was to require him to sign the contract. The Supreme Court of Mississippi, inter alia, said:

"The difficulty here arises because the board on February 1 rejected one of the superintendent's recommendations and undertook itself to exercise the full appointive power. It had the right to reject the recommendation, for cause, but not to make the appointment of one not recommended."

* * *

"However, THE BOARD HAD NO POWER UNDER THE STATUTE TO MAKE APPOINTMENT OF A PRIN-

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1. Miss. Code Ann. (1942) Sec. 6282-07.
2. Miss. Code Ann. (1942) Sec. 6282-05.

CIPAL WHO WAS NOT RECOMMENDED BY THE COUNTY SUPERINTENDENT." (Emphasis added).

The evidence here is plain and uncontradicted that the county superintendent did not recommend plaintiff for employment. Hence, the board was without any authority to employ her and should not, therefore, properly be in this case. The board would be properly in this case (if it could be at all) only if the superintendent had recommended plaintiff and the board had declined to follow the recommendation. Plaintiff is entitled to no relief against the board.

The question raised by the proposed amendment to the complaint, which has been referred to as the "lawsuit" part of this case will be dealt with next. Responding to questions put from the bench the county superintendent stated that the reasons for his refusal to recommend plaintiff for employment were that the husband of plaintiff had been convicted in a Court of record on a morals charge; that two libel suits were pending against the husband by the Chief of Police of the City of Clarksdale and the Prosecuting Attorney of Coahoma County, and, that he had been reliably informed that plaintiff would probably be sued to set aside as fraudulent, conveyances of property made to her by her husband.

In essence as the Court understands it from the sparse record made on trial, his position was that plaintiff's husband had become notorious in the community and that plaintiff was "tarred with the same brush" in the public mind by reason of her marriage and that she, too, probably would become personally and unfavorably involved in the public mind with the aforementioned fraud action. And, that because of these circumstances she had become un-

suited to teach young children.[3] Assuming arguendo for the moment that the superintendent's discretion is subject to judicial review, it has long been recognized that a teacher of young people occupies a sensitive position. For example, in Adler v. Board of Education, 342 U.S. 485, 96 L. Ed. 517 (1952), it was said:

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. FROM TIME IMMEMORIAL, ONE'S REPUTATION HAS BEEN DETERMINED IN PART BY THE COMPANY HE KEEPS." (Emphasis added).

Thus, it would appear here that the superintendent had good cause and exercised a sound discretion, and that his actions should not now be overturned.

To deal properly with the one principal question presented by the complaint it is necessary to summarize plaintiff's theory with respect thereto and the evidence before the Court. The essence of plaintiff's theory is that she and her husband are long time members of the National Association for the Advancement of Colored People; that her husband is and has been Mississippi president of this organization; that these activities are contrary to the

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3. It is also uncontradicted that the superintendent did not recommend another teacher for re-employment because of the bad reputation for moral misbehavior of that teacher's spouse.

policies and views of defendants; that she was not re-employed as a teacher because of these facts; and, that thereby she was denied her rights contrary to the Constitution of the United States, especially amendments XIV and XV.

It does not require the citation of any authority to sustain the position that it was plaintiff's burden to establish her case on this theory by a preponderance of the evidence. This she failed to do. In fact, the plain, uncontradicted evidence is that neither her membership nor the membership of her husband in the NAACP, nor the activities of either or both of them in working for the goals and objectives of this organization had anything to do with the refusal of the county superintendent to recommend her to the board of education for reemployment for the school year 1962-1963.

The evidence does show that she was employed, on successive one year contracts, as a teacher in this school system for a period of eleven years (with only one break for one year, which apparently was at her own choice). It also shows that she was recommended for re-employment and that she was reemployed for many years after her membership and the membership of her husband in the NAACP, and the activities of both in the "civil rights" area were well known to the defendant superintendent and his predecessor on this office. There are no racial or civil rights overtones in this record with respect to plaintiff's relationship with the public school officials of Coahoma County nor with respect to the fact that she was not recommended for reemployment as a teacher.

The real reason for the refusal of the superintendent to recommend plaintiff for reemployment (which is uncontradicted by any evidence in this record) has been

dealt with heretofore in discussing what has been called the "lawsuit" phase of this case and plaintiff's motion to amend.

It also must be borne in mind that plaintiff had a one year contract for the school year 1961-1962, that this contract was fully performed by the parties thereto, that it ran its course and expired. That contract is not and could not be in this case. By its terms and under the statutes no rights survived its expiration to any of the contracting parties. Defendants could not have required plaintiff to accept another contract, nor can plaintiff now require that she be given a new contract. The fact that she had been employed as a teacher for one year (or for more than a year) gave her no rights for re-employment for the school year 1962-1963, or for any other year. Whether she would or would not be employed for another year depended entirely on whether she would or would not be recommended by the superintendent. He did not recommend her. That ends the matter.

As was said in Lott, supra:

"Although political and factional considerations should not enter into a recommendation by a county superintendent and an approval by a county board, it is not a judicial function to determine the extent to which those factors affected Lott and the board."

The laws of the State of Mississippi, as interpreted by its Supreme Court in Lott are binding on this Court in this case since there is no provision of the constitution or laws of the United States to the contrary. Title 28, U.S.C. Sec. 1652. And, the evidence is wholly insufficient, as has been said, to make applicable here the constitutional theory relied on by plaintiff.

It also needs remembering that it is not now or has it ever been within the purview of judicial power to make contracts for parties. Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 3 L. Ed. 2d 723, 79 S. Ct. 710 (1959); Memphis & L. R. R. Co. v. Southern Export, 117 U.S. 1, 29 L. Ed. 791, 6 S. Ct. 452 (1882).

None of the cases cited by plaintiff can give her any real comfort. Some of them, for example, deal with the discharge of teachers during the contract period. Clearly they are not in point. Others deal with the power of a state with respect to the creation of standards for the admission to a profession. These have no application here. Another has to do with a suit by Negro teachers for salaries equal to those paid for white teachers. No question of salary is involved in this case. Another holds that there can be no discrimination in the law with reference to the following of occupations. No such discrimination is at issue here. All other authorities cited are equally beside the point, with the exception of Adler, supra, which in part supports this Court's view of this controversy.

From what has been said, it seems obvious that plaintiff is not entitled to the principal relief sought and this Court will not require by injunction that she be re-employed as a teacher in the public school system of Coahoma County, Mississippi.

Ancillary to the principal relief sought plaintiff attacks a requirement of state law that teachers annually file an affidavit listing all organizations of which they are members. Inasmuch as plaintiff in her present status as a non-teacher is not affected by this requirement, this issue is now moot.

Plaintiff is entitled to no relief and an order is being entered this date in accordance with this opinion.

This the 23rd day of December, 1963.

CLAUDE F. CLAYTON
(Claude F. Clayton)
District Judge

Order

(Title Omitted)

In accordance with the opinion of the Court released this date in this cause, it is,

Ordered:

(1) That the motion of the plaintiff, Noelle M. Henry, to amend the pleadings to conform with the evidence shall be and is hereby overruled.

(2) That the prayer of the complaint shall be and is hereby denied and the same is hereby dismissed.

(3) That the defendants are awarded costs from the plaintiff as they may have in course been taxed.

This the 23rd day of December, 1963.

CLAUDE F. CLAYTON,
(Claude F. Clayton),
District Judge.

Ent. C.O. B. 2, p. 568, on December 26, 1963.